Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

JAY BRUMMETT,

Petitioner,

v.

JIMMY CAMPBELL; JIM BOLES; and DOUG SANDERS,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE COURTS BELOW APPLIED THE PROPER SUMMARY JUDGMENT STANDARDS IN RULING THAT THE PRIVATE RESPONDENTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

2. WHETHER THE COURTS BELOW ERRED IN RULING THAT PETITIONER CANNOT ESTABLISH THE CONSPIRACY ELEMENT OF HIS § 1983 CLAIM AS A MATTER OF LAW.

LIST OF INTERESTED PARTIES

1. The Petitioner herein, Plaintiff/Appellant below is Jay Brummett.

2. The three Respondents herein, Defendants/Appellees below, are Jimmy Campbell, Doug Sanders, and Jim Boles.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a - 9a) is not a reported decision. The decision of the district court was not reported but is reprinted herein (App. B, infra, 10a - 32a).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 25, 1994. Petitioner did not seek a rehearing of the decision. This court has jurisdiction under 28 U.S.C. § 1954(1).

FEDERAL STATUTES INVOLVED

Section 1983 of Title 42 of the United States Code provides:

> **§ 1983 Civil Action for deprivation of rights**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides:

> **Section 1**
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In January, 1982, Petitioner Jay Brummett ("Brummett") obtained a $33,445.08 business loan from First State Bank of Cleburne, Texas ("FSB"). FSB retained a security interest in the inventory[1] and fixtures of Brummett's retail stereo business. Brummett's venture into the retail stereo business proved unsuccessful, and by March

[1] When FSB made the January 1982 loan to Brummett, it did so knowing that the loan was under-collateralized by approximately $5,000.00.

1983, Brummett was unable to make further payments on the note due to FSB.

Brummett timely informed FSB loan officer Doug Sanders[2] ("Sanders") in February 1983 of his financial inability to make further payments on the note. Shortly thereafter Sanders, accompanied by FSB collection officer Jim Boles ("Boles"), visited Brummett's store to survey the inventory.[3] Brummett truthfully informed Sanders and Boles that the inventory listed on the December 1981 sheet had long been sold in the ordinary course of business,[4] although the fixtures listed in the security agreement were in the store. Sanders promptly reported back to FSB that the original inventory that secured Brummett's loan was no longer in Brummett's possession. Brummett closed his stereo business in April 1983.

After Brummett's business closed down, Sanders requested that Brummett and his wife execute a new note with FSB. Contemplating bankruptcy, Brummett refused, citing his financial inability to repay the note. Sanders request then turned into a firm demand that Brummett execute a new note with FSB. Brummett refused. Sanders thereafter ominously warned Brummett that he would

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[2] Respondent Sanders actively pursued and eventually convinced Brummett to establish a banking relationship with FSB.

[3] Armed with the original inventory sheet Brummett presented to FSB in December 1981, Boles and Sanders came in search of the inventory items actually listed on the sheet.

[4] The security agreement executed by Brummett and FSB clearly contemplated that inventory would be sold by Brummett in the ordinary course of business.

not be responsible for the consequences resulting from Brummett's failure to sign a new note with FSB.

On May 13, 1983, FSB, through counsel, sent Brummett a standard collection letter demanding full payment of the balance[5] remaining on the January 1982 note. Brummett did not respond to the letter.

FSB also held a May 1983 Board of Directors meeting wherein Brummett's default and sale of inventory were discussed. It was decided at this meeting that FSB would seek to criminally prosecute Brummett for selling the inventory he had listed as collateral.

Among others present at the May 1983 meeting were Respondent Jimmy Campbell and John Maclean.[6] John Maclean was not only the Johnson County Criminal District Attorney, but also sat on the FSB Board of Directors.[7] After the meeting, Campbell asked Sanders to carry Brummett's file to the District Attorney's office. Sanders complied, but Maclean steered Sanders to then County Attorney Dan Boulware,[8] ("Boulware") stating he could

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[5] Brummett still owed approximately $17,000.00 on the note.

[6] Maclean was dismissed as a Defendant in this action on immunity grounds. *Brummett v. Camble*, 946 F.2d 1178, 1182 (5th Cir. 1991).

[7] Maclean had also borrowed at least $86,490.50 from FSB, almost half of which was unsecured. In addition, Maclean was politically familiar with Brummett, having actively helped to defeat Brummett's 1980 state senatorial bid by managing the political campaign of Brummett's opponent.

[8] Boulware was dismissed as a Defendant in this action on immunity grounds. *Brummett*, 946 at 1182.

not prosecute Brummett's case due to a conflict of interest.[9]

In the latter part of June 1983, FSB notified Brummett through counsel that it had turned his note-default matter over to the District Attorney's office. At the same time, Brummett received notice from Boulware advising Brummett that he was subject to indictment for "removing" the collateral that served as a security interest for his debt to FSB – a felony violation of Tex. Penal Code § 32.33(e).

Brummett appeared at the Johnson County Grand Jury in June, 1983. Before Brummett was called to testify he observed Sanders, Maclean, Boulware, and grand juror Charles Credeur jointly file into Maclean's office. The foursome remained together for about 30 minutes. Boulware, who was the first to exit the office, went directly into the jury room. Almost immediately thereafter Sanders was called to testify. Brummett testified next.

Brummett testified truthfully to the grand jury that no crime had taken place, and that FSB knew that the inventory originally listed as collateral for the January 1982 note would be sold in the ordinary course of business. Boulware then angrily accused Brummett of selling mortgaged property in violation of Texas law. The Grand

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[9] It is curious why Maclean would decline to handle Brummett's case on conflict of interest grounds by turning the matter over to Boulware, who clearly was also an interested party. Boulware was not only a major stockholder of FSB, but was also a co-maker on at least one significant FSB loan with Maclean.

jury indicted Brummett for "removing"[10] property with intent[11] to hinder enforcement of FSB's security interest.

Brummett eventually filed for personal bankruptcy. FSB however never challenged the discharge of the January 1982 note.

Brummett eventually hired Frank McCown[12] ("McCown") to represent him. McCown went to Cleburne and reviewed Brummett's criminal file. Upon reviewing the file, McCown concluded that the file contained no evidence that Brummett violated § 32.33 or any other

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[10] Brummett was told by a grand juror that Boulware never presented evidence of "removal" nor did Boulware ever inform the grand jury that "removal" was even at issue. Without access to depose the grand jurors however, Brummett's efforts to substantiate this claim in the proper evidentiary form were forever thwarted.

[11] Brummett strenuously contends that the grand jury passed a resolution stating that Brummett had no intent to violate § 32.33. Scienter is a required element of § 32.33. Brummett could therefore not have violated the statute without intent. Brummett further contends that the grand jury gave this "no intent" resolution to Boulware and asked Boulware to forward the same to Brummett's counsel. Boulware flatly denies this contention. Without access to depose the grand jurors however, Brummett is unable to substantiate this claim. If proven, this allegation would constitute significant evidence of Boulware's bad faith and would likewise bolster Brummett's conspiracy claim.

[12] McCown specializes in criminal law and is a former state court prosecutor. McCown also served for several years as a United States Attorney, Criminal Division, Fort Worth Office of the Northern District of Texas.

Texas law.[13] In April 1986. the charges against Brummett were dismissed for lack of sufficient evidence.

Brummett alleged that under no theory could the Respondents have concluded that he was guilt of any crime because he sold inventory in the ordinary course of business. Brummett also believes that a reasonable trier of fact could conclude that Boulware and Maclean, in collusion with the Respondents, tainted the grand jury proceedings to obtain a baseless indictment against Petitioner.

REASONS FOR GRANTING THE WRIT

The Decision of the Fifth Circuit is clearly inconsistent with the Summary Judgment standards set forth in *Adickes v. S.H. Kress and Co.*, 398 U.S. 144 (1970) that relate to civil conspiracies. The Fifth Circuit construed the facts in a light most favorable to Respondents, and made judgments in their favor which rested solely on credibility determinations. Likewise, the court erroneously permitted the Respondents to prove their nonparticipation in a civil conspiracy by the use of self-serving affidavits.

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[13] Significantly, when Brummett subsequently sought discovery of the criminal file, it had mysteriously disappeared.

I. THE FIFTH CIRCUIT ERRED BY CONCLUDING THAT BRUMMETT COULD NOT ESTABLISH THE CONSPIRACY ELEMENT OF HIS SECTION 1983 CLAIM AS A MATTER OF LAW.

The Fifth Circuit erred in dismissing Brummett's civil rights case because Brummett can sufficiently raise a genuine issue of material fact regarding the conspiracy element of his § 1983 claim. In ruling that Brummett could not establish evidence of a conspiracy, the court erred in three respects: (1) the court failed to properly recognize the critical role that circumstantial evidence plays in proving a civil rights conspiracy claim; (2) the court failed to consider that a civil rights conspiracy is generally not the proper subject matter for summary dismissal; and (3) the court improperly accorded too much weight to the affidavits submitted by the Respondents.

A. The Fifth Circuit Failed to Properly Recognize the Critical Role That Circumstantial Evidence Plays in Proving a Civil Rights Conspiracy Claim.

It is an axiomatic principle of law that the existence of a civil conspiracy can be proved by circumstantial evidence. *E.g, Adickes v. S.H. Kress and Co.*, 398 U.S. 144 (1970); *Mack v. Newton*, 737 F.2d 1343, 1350 (5th Cir. 1984).[14] Ordinarily, direct evidence of a conspiracy does

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[14] *See, also, Wagenmann v. Adams*, 892 F.2d 196 (1st Cir. 1987); *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979); *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986); *Monument*

not exist. *See, Hampton v. Hanrahan,* 600 F.2d 600, 621 (7th Cir. 1979). To establish a conspiracy, express agreement among all the conspirators is not a required element. *Id.* Although co-conspirators must generally share the same conspiratorial objective, it is not required that they know all of the plans details, or that they share a common motive to reach the desired result. *Id.*

Moreover, mere acquiescence in an illegal action can amount to a conspiracy, *Hafner v. Brown,* 983 F.2d 570, 578 (5th Cir. 1992), and "subsequent acts may tend to prove the nature of a prior conspiracy." *Grandstaff v. City of Borger, Texas,* 767 F.2d 161 (5th Cir. 1985) (citing *Anderson v. United States,* 417 U.S. 211, 219 (1974)). Finally, participants in a conspiracy need not know either the limits of the illegal plan or the identity of all the conspirators. *Hampton,* 600 F.2d at 621.

When construed in a light most favorable to Brummett, with all reasonable inferences resolved in his favor, the following circumstantial evidence mandates under *Adickes* that a genuine issue of material fact remains on whether the Respondent entered into a conspiracy with public officials to maliciously prosecute Brummett:

> (1) there existed political animosity between Brummett, Boulware and Maclean; (2) Maclean was an FSB Director, was heavily indebted to FSB, and was the Johnson County District Attorney; (3) Boulware was a major FSB stockholder, was jointly indebted to FSB with

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Builders v. Am. Cemetery Ass'n, 891 F.2d 1473 (10th Cir. 1989); *DeLong Equip. v. Washington Mills Abrasive,* 887 F.2d 1499 (11th Cir. 1989).

Maclean, and was the County Attorney for Johnson County; (4) Sanders and Boles reported back to Campbell that Brummett had sold his inventory; (5) FSB undercollateralized Brummett's note; (6) well known to the Respondents, the sale of Brummett's inventory was a contemplated part of his agreement with FSB, and could not constitute a crime under Texas law; (7) the Respondents, as well as Boulware and Maclean, knew there was no evidence that Brummett ever "removed" property from the State of Texas; (8) after Brummett initially defaulted on his FSB note, Sanders threatened him with "unknown consequences" for failure to sign a new note; (9) Campbell and Maclean attended the FSB meeting where it was decided that Brummett's file would go to the district attorney; (10) Campbell and Sanders met and Sanders agreed to take Brummett's file to the district attorney; (11) for thirty minutes immediately prior to presenting Brummett's case to the grand jury, Sanders, Boulware, Maclean, and a grand juror met behind closed doors in Maclean's office; (12) Maclean and Boulware's offices were located in the same building in close proximity to each other; (13) FSB never challenged the Bankruptcy discharge of Brummett's January 1982 note; (14) three years after his indictment, Brummett's case was discharged for lack of evidence; (15) testimony of McCown that Brummett's Johnson County criminal file contained no evidence that Brummett had committed any crime; and (16) Brummett's Johnson County criminal file mysteriously disappeared

when Brummett sought to obtain it through discovery.[15]

B. The Fifth Circuit Failed to Consider That A Civil Rights Conspiracy is Generally Not the Proper Subject Matter for Summary Dismissal.

When a civil rights Plaintiff has alleged a conspiracy to violate civil rights, "[t]he existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide." *Adickes*, 398 U.S. at 176. If circumstantial evidence of a civil rights conspiracy could lead reasonable persons to reach different conclusions regarding the conspiracy, the case should not be taken from the jury. *See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700-701 (1962).

The Fifth Circuit failed to take note of these important principles when it found that Brummett cannot establish the conspiracy element of his § 1983 claim as a matter of law. The court improperly took the conspiracy issue from the jury because reasonable people could clearly differ on whether the Respondents, in collusion with Boulware and Maclean, engaged in a conspiracy to maliciously prosecute Brummett on baseless charges. Petitioner emphasizes that regardless of the particular knowledge possessed by each Respondent regarding the agreement to prosecute Brummett, the *sequence of events*

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[15] This statement of the evidence does not include Brummett's contentions that (1) the grand jury was never presented any evidence of removal by Boulware, or (2) that the grand jury passed a "no intent" resolution in favor of Brummett and gave the same to Boulware.

leading up to Brummett's indictment, as well as those occurring afterward, demonstrate the distinct plausibility of a conspiracy. *See, generally, Adickes.*

C. The Fifth Circuit Improperly Accorded Too Much Weight to the Affidavits Submitted by the Respondents.

The Fifth Circuit's opinion clearly notes that Sanders, Boles, and Campbell assert that they did not conspire with Maclean or Boulware. The court then lends great weight to these assertions to determine that a conspiracy is not supported by the evidence. This deference to the moving party's self-exculpating statements is error.

Affidavits should not be used to decide factual issues presented by a claim. *McCullough Tool Co. v. Well Surveys, Inc.*, 395 F.2d 230, 236 (10th Cir. 1968), *cert. denied*, 393 U.S. 925 (1969). Affidavits which merely contain flat denials should not be accorded substantial weight. *See, Goodloe v. Davis*, 514 F.2d 1274, 1276 (5th Cir. 1975).

It is clear that evidence of a conspiracy can only be conclusively proven by a conspirator's direct testimony. It was error for the court to accept and give weight to the Respondents' conclusory denials that they did not participate in a conspiracy to violate Brummett's civil rights. Such reliance clearly contravenes the requirements of *Adickes.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-1751
Summary Calendar

JAY BRUMMETT,

Plaintiff-Appellant,

VERSUS

JIMMY CAMBLE[1], ET AL.,

Defendants,

JIMMY CAMBLE, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas

(3:87-CV-0789-H)

(Filed Aug. 25, 1994)

Before KING, JOLLY and DeMOSS, Circuit Judges.

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[1] The correct last name of this defendant may be "Campbell"; but he was referred to as "Camble" in the original complaint, in briefs and in the opinion of this Court on the prior appeal. Nothing in the records indicates that two different individuals with similar names were involved; and for consistency, we use the spelling indicated.

PER CURIAM:**

BACKGROUND

Brummett borrowed $33,445.80 from First State Bank of Cleburne (FSB) to open a retail stereo store. The loan was collateralized by the equipment and inventory in the store. Brummett defaulted on the loan and when FSB loan officer Doug Sanders and collections officer Jim Boles visited the store to survey the inventory listed as collateral for his loan, Brummett informed them that the inventory had been sold to customers in the normal course of business. Brummett closed the store in April 1983, and the bank, following standard loan collection procedures, sent a demand letter for the full amount of the loan plus interest to Brummett. The bank also informed Brummett that it had decided to turn the matter over to the district attorney's office.

Brummett was informed by then county attorney Dan Boulware that he was subject to indictment for "removing" collateral that secured his debt to FSB in violation of Texas Penal Code Ann. § 32.33 (West 1994). The Johnson County grand jury indicted Brummett for "removing" property with intent to hinder enforcement of FSB's security interest. Three years later the charges were dismissed for insufficient evidence.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Brummett filed a civil rights complaint against then county attorney Boulware, then district attorney John R. MacClean, Johnson County, FSB, Sanders, Boles, and FSB president Jimmy Camble. Brummett alleged that Boulware and MacClean had personal interests in FSB and therefore conspired with FSB employees to maliciously prosecute him for "removing" collateral from Texas when there was no evidence to support the allegation. The district court dismissed the claims against the public defendants, Boulware, MacClean, and Johnson County, based on absolute prosecutorial immunity. The district court also granted summary judgment for the private defendants, Sanders, Boles, Camble and FSB, on statute of limitations grounds. On appeal, this Court affirmed the dismissal of Boulware and MacClean on absolute prosecutorial immunity grounds, but vacated the judgment with respect to Johnson County and the private defendants. *See Brummett v. Camble,* 946 F.2d 1178 (5th Cir. 1991), *cert. denied,* 112 S. Ct. 2323 (1992).

On remand Johnson County and the private defendants filed motions for summary judgment. The district court granted the motions because there was insufficient evidence to support Brummett's allegations that the public defendants conspired with the private defendants to maliciously prosecute him. The district court dismissed the § 1983 claims with prejudice and the pendent state law claim without prejudice.

OPINION

In Brummett's first appeal this Court recognized that a claim for malicious prosecution is cognizable under

§ 1983. *See Brummett*, 946 F.2d at 1180 & n.2. Under the law of the case doctrine, the decisions of law made in a former appeal must be followed in all subsequent proceedings in the same case unless "(i) a subsequent trial produces substantially different evidence; (ii) the prior decision was clearly erroneous and would work a manifest injustice; or (iii) controlling authority has since made a contrary decision of law applicable to the issue." *Hermann Hosp. v. MEBA Medical and Benefits Plan*, 959 F.2d 569, 578 (5th Cir. 1992). Subsequent to this Court's ruling in the first appeal, the U.S. Supreme Court held in a plurality opinion that there is no substantive due process claim for malicious prosecution, although there may be a Fourth Amendment claim. *Albright v. Oliver*, ___ U.S. ___, 114 S. Ct. 807, 813-14, 127 L. Ed. 2d 114 (1994) (plurality opinion). Brummett alleged a Fourth Amendment violation, and therefore because the Supreme Court did not decide whether a Fourth Amendment malicious prosecution claim is still cognizable under § 1983, Brummett may pursue his claim under the law of the case doctrine. *See Johnson v. Louisiana Dep't of Agriculture*, 18 F.3d 318, 320 (5th Cir. 1994) ("[t]he Supreme Court has recently held that malicious criminal prosecution, if actionable in constitutional law, should be governed by the Fourth Amendment rather than substantive due process. . . . ").

This Court reviews the district court's grant of summary judgment *de novo*. *Weyant v. Acceptance Ins. Co.*, 917 F.2d 209, 212 (5th Cir. 1990). Summary judgment is appropriate when, considering all of the facts in the pleadings, depositions, admissions, answers to interrogatories, and affidavits, and drawing all inferences in the light most favorable to the nonmoving party, there is no genuine

issue of material fact and the moving party is entitled to judgment as a matter of law. *Newel v. Oxford Management, Inc.*, 912 F.2d 793, 795 (5th Cir. 1990). There is no genuine issue of material fact, if taking the record as a whole, a rational trier of fact could not find for the nonmoving party. *Id.*

Brummett argues that he presented sufficient competent summary judgment evidence to overcome the private defendants' motion for summary judgment. "A private party may be held liable under § 1983 if he or she is a willful participant in joint activity with the State or its agents." *Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir.) (internal quotation and citation omitted), *petition for cert. filed*, (U.S. July 5, 1994) (No. 94-55). To support a conspiracy claim the plaintiff must establish that there was an agreement between the private and public defendants to commit an illegal act and that he was deprived of his constitutional rights. *Id.* A private defendant's action that elicits state authority does not constitute state action. *See Daniel v. Ferguson*, 839 F.2d 1124, 1130 (5th Cir. 1988) (reporting criminal action and signing criminal complaint does not amount to state action).

Brummett argues that the district court's decision is based on a faulty premise because the district court improperly assumed that Brummett was indicted under Tex. Penal Code Ann. § 32.33(f)(2) (Vernon 1994), disposing of secured property, when in fact he was indicted under § 32.33(e), "removing" a secured property interest, and there was no evidence of removal. From the record it appears that Brummett was indicted under § 32.33(e), but

he still must provide competent summary judgment evidence that the public and private defendants conspired to falsely prosecute him under that section of the statute.

The summary judgment evidence established that the public and private defendants denied any conspiracy to maliciously prosecute Brummett. Boles and MacClean filed affidavits denying any conspiracy. Camble, Boulware and Sanders denied any conspiracy in their deposition testimony. Robert Lawing, the assistant district attorney who moved to dismiss the indictment, also testified by deposition that he never discussed the case with any FSB employees, except to inform them of the dismissal, which he considered to be based on "legal technicalities."

Brummett offered no competent evidence to refute the private defendants' summary judgment evidence. In his affidavit, Brummett averred that MacClean, Boulware, Sanders, and grand juror Charles Credeur met in MacClean's office immediately prior to Brummett's appearance before the grand jury. He did not provide any evidence to establish that his case was discussed during the alleged meeting. Unsubstantiated allegations and speculation cannot defeat a summary judgment motion. *Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992); *International Shortstop, Inc. v. Rally's Inc.*, 939 F.2d 1257, 1266 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 936 (1992). Brummett also stated that one grand juror told him that the grand jury had passed a "no criminal intent" resolution and asked Boulware to inform Brummett of that resolution. Hearsay statements are not competent summary judgment evidence. *Cormier v. Pennzoil Exploration & Prod. Co.*, 969 F.2d 1559, 1561 (5th Cir. 1992). Finally, Brummett's

claims that MacClean and Boulware pursued the indictment for political and personal reasons are unsubstantiated and cannot defeat the motion for summary judgment. *See Thomas,* 975 F.2d at 235.

Brummett argues that MacClean and Boulware are not entitled to absolute prosecutorial immunity. However, this Court affirmed the district court's dismissal of those defendants in the first appeal. *See Brummett,* 946 F.2d at 1180-82. The law of the case doctrine, therefore, prohibits Brummett challenging dismissal of the public defendants in this appeal. *See Hermann Hosp.,* 959 F.2d at 578.

Brummett also challenges the district court's judgment granting summary judgment for Johnson County. To establish county liability under § 1983 a plaintiff must demonstrate a county policy or custom which caused the constitutional violation. *Colle v. Brazos County,* 981 F.2d 237, 244 (5th Cir. 1993). Only when the execution of a county's policies or its customs deprives an individual of constitutional or federal rights does liability under § 1983 result. Even assuming that Brummett was indicted without probable cause, Brummett has offered no evidence that Johnson County had a policy of indicting individuals without probable cause. Boulware stated in his affidavit that he followed established procedures while pursuing the indictment against Brummett. Allegations of a single, isolated incident are insufficient to show the existence of a custom or policy. *Fraire v. City of Arlington,* 957 F.2d 1268, 1278 (5th Cir.), *cert. denied,* 113 S. Ct. 462 (1992). Brummett has not demonstrated that Johnson County has a policy or custom which caused his alleged constitutional violation.

Brummett argues that the district court improperly granted Johnson County's motion for a protective order to prevent Brummett from deposing members of the grand jury that indicted him. Johnson County, on behalf of the members of the grand jury, filed the motion for the protective order arguing that, under state law, grand jury deliberations are secret and Brummett had not shown a particularized need for the information that outweighed the need for secrecy. The district court, applying state law which mandates that grand jury deliberations remain secret, *see* Tex. Code Crim. Proc. Ann. art. 20.02 (West 1977), granted Johnson County's motion.

Evidentiary privileges in federal court are governed by Fed. R. Evid. 501. *ACLU v. Finch*, 638 F.2d 1336, 1342 (5th Cir. 1981). In federal question cases, unless state law supplies the rule of decision for an element of a claim or defense, privileges are governed by principles of common law as they are interpreted by the federal courts. *Id.* at 1342. To determine whether to apply the state law privilege, the federal court must balance the policies behind the privilege against the policies favoring disclosure. *Id.* at 1343. "[I]n any given instance the special federal interest in seeking the truth in a federal question case may require disclosure despite the existence of a state rule holding the same communications privileged." *Carr v. Monroe Mfg. Co.*, 431 F.2d 384, 388 (5th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971).

Brummett argues that he needs to depose the grand jurors to establish that Boulware presented no evidence of "removal" to the grand jury and that the grand jury returned a "no criminal intent" resolution. As discussed

above, even assuming that Brummett was indicted without probable cause under the removal section of the statute, Brummett has offered no evidence that the public and private defendants conspired to obtain the illegal indictment. The information that Brummett sought from the grand jurors would not establish a conspiracy between the public and private defendants. Brummett presented no evidence that would allow this Court to disregard the Texas state law privilege making grand jury deliberations secret.

The private defendants argue that Brummett failed to establish his state law claim for malicious prosecution. The district court did not address the merits of this claim, but rather dismissed the claim without prejudice for lack of subject matter jurisdiction. The private defendants did not file a cross-appeal from the district court's judgment, and we therfore decline to address the claim in this appeal. *See In re Toyota of Jefferson, Inc.*, 14 F.3d 1088, 1091 n.1 (5th Cir. 1994) (when there is no cross-appeal, the appellee cannot attack the decision of the district court to enlarging his own rights or lessen the rights of his adversary).

The decisions of the trial court are AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JAY BRUMMETT	*	
	*	
Plaintiff,	*	Civil Action No.
v.	*	3-87-CV-0789-H
JIMMY CAMPBELL, et al.	*	(Filed
	*	July 14, 1993)
Defendants	*	

MEMORANDUM OPINION AND ORDER

Before the Court are Defendant Johnson County's Motion for Summary Judgment, filed May 19, 1993; the Private Defendants' Motion for Summary Judgment, filed May 20, 1993; Plaintiff's Joint Supplementary Response, filed June 2, 1993; Johnson County's Reply, filed June 4, 1993; and the Private Defendants' Reply, filed June 7, 1993.

I. Background

Plaintiff Jay Brummett presently maintains this suit against a county and several private Defendants, contending that they are liable under 42 U.S.C. §1983 and state law for their alleged conspiracy to maliciously prosecute him. Initially, Plaintiff sued two prosecuting attorneys, Johnson County, the First State Bank of Cleburne, Texas ("FSB" or "Bank") and three representatives of FSB

– Jimmy Campbell, Doug Sanders, and Jim Boles – under various theories for their alleged conspiracy to illegally indict and maliciously prosecute Plaintiff under an inapplicable state criminal statute. The June 30, 1983 indictment charged that Plaintiff improperly disposed of property that secured a loan that Plaintiff had obtained from FSB. A more detailed summary of the background of this case is set out in *Brummett v. Camble*, 946 F.2d 1178 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 2323 (1992).

This Court originally dismissed Plaintiff's §1983 claims against the prosecutors and Johnson County on immunity grounds, granted summary judgment on the §1983 claims for the remaining Defendants – FSB and the FSB officers ("Private Defendants") – on limitations grounds, and dismissed Plaintiff's pendent state law malicious prosecution claim. The Fifth Circuit Court of Appeals affirmed the dismissal of the prosecutors, vacated the dismissal of Johnson County, reversed the conclusion that the applicable statute of limitations barred Plaintiff's §1983 malicious prosecution claim, and left the question of whether Plaintiff's state law claim should be reinstated to the discretion of this Court.[1]

After the Supreme Court denied the Private Defendants' petition for a writ of certiorari, 112 S. Ct. 2323

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[1] To clarify the record, the Court reinstates Plaintiff's state law malicious prosecution claim. *See Brummett*, 946 F.2d at 1185 n.5. The Court also notes that, in addition to his §1983 malicious prosecution claim, Plaintiff has raised five other §1983 claims in his Amended Complaint and proposed Pretrial Order. However, since Plaintiff abandoned the non-malicious prosecution §1983 claims when this case was appealed, they are not longer before the Court. *See id.* at 1184 n.4.

(1992), this case returned here. Johnson County and the Private Defendants have now moved for summary judgment.

II. Summary Judgment

"Summary judgment reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1197 (5th Cir. 1986).

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment or partial judgment as a matter of law. *See* Fed. R. Civ. P. 56. Before a court may grant summary judgment, the moving party must demonstrate that it is entitled to judgment as a matter of law because there is no actual dispute as to an essential element of the nonmovant's case. *See Topalian v. Ehrman*, 954 F.2d 1125 (5th Cir.), *cert. denied*, 113 S. Ct. 82 (1992). The threshold inquiry, therefore, is "whether . . . there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). Of course, "the substantive law will identify which facts are material." *Id.* at 248.

The Supreme Court has explained that a movant for summary judgment need not support the motion with evidence negating the opponent's case; rather, once the movant establishes that there is an absence of evidence to

support the non-movant's case, the burden is on the non-movant to make a showing sufficient to establish an issue of fact for each element as to which that party will have the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986).

Once the moving party shows that it is entitled to summary judgment, the burden shifts to the nonmoving party to "come forward with 'specific facts showing that there is a *genuine issue for trial.*' " *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (emphasis in original) (quoting Rule 56(e)); *see also Fontenot*, 780 F.2d at 1195-98. A party must do more than simply show some "metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Stated another way, "[i]f the record, taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Friou v. Phillips Petroleum Co.*, 948 F.2d 972, 974 (5th Cir. 1991) (citing *Matsushita*, 475 U.S. at 587). However, all of the evidence must be viewed in the light most favorable to the motion's opponent. *Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 292 (5th Cir. 1990).

III. Analysis

The summary judgment evidence forwarded by the parties in affidavits and excerpts from depositions reveals the following:

1) At the time of Plaintiff's indictment, Dan Boulware was the county attorney for Johnson County. He remained county attorney until February of 1984. After

serving in this office, Boulware became the district attorney for Johnson and Somervell counties. Plaintiff adds that Boulware was a stockholder of FSB.

2) John MacLean was the district attorney for Johnson and Somervell counties at the time of Plaintiff's indictment. He remained in this position until February of 1984. MacLean was also a stockholder of FSB and a director of the Bank until 1984.

3) At the relevant times in this suit, Jimmy Campbell was the president and a director of FSB; Doug Sanders was a vice-president of FSB and a loan officer of the Bank; and Jim Boles was a collection officer of FSB.

4) In January of 1982, Plaintiff borrowed $33,445.80 from FSB. This loan rolled-over several earlier loans that Plaintiff had received from the Bank. The January 1982 promissory note was secured by the equipment and inventory of Plaintiff's retail stereo store in Cleburne, Texas.[2] Plaintiff reports that FSB entered into this loan knowing that the value of Plaintiff's collateral was $28,475.77, approximately $5,000 less than the amount of the loan.

5) By March of 1983, because of decreasing sales and high expenses, Plaintiff had ceased making the payments that were due under the loan.

6) By the first week of April 1983, Plaintiff had closed his stereo store. The Private Defendants claim that,

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[2] The loan documents show that the Bank acquired a security interest in "[a]ll inventory now owned including but not limited to the attached list." The "attached list" is a December 1981 inventory list from Plaintiff's stereo store. *See* ¶ 7, *infra.*

after he stopped making payments on the loan, Plaintiff did not give the Bank the proceeds of the sale of the inventory that had secured the loan. However, Plaintiff states that he related his financial difficulties and the decision to close his stereo business to Sanders.

7) In March of 1983, after Plaintiff ceased making payments on the note, Sanders and Boles visited Plaintiff's stereo store to inspect the inventory that secured the loan.[3] According to Plaintiff, Sanders and Boles brought with them the December 1981 inventory sheet that Plaintiff had presented to FSB at the time he took out his January 1982 loan. Sanders and Boles asked whether any of the inventory listed on their sheet remained in the store. Plaintiff explained that the exact inventory listed on the sheet had been sold over the past few months, but that the fixtures listed on the inventory sheet were still in the store. Plaintiff also explained that he had purchased other inventory to replace some of the inventory that had been sold. However, Plaintiff reports that he noted that he had not replaced some of the more expensive, slower selling items.[4]

8) Sanders and Campbell claim that the inventory was removed from the premises without the knowledge or consent of the Bank. However, Plaintiff states that no

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[3] Defendant Boles states that he was aware that FSB had made a loan to Plaintiff. However, he claims that he did not participate in the decision to extend the loan and that he was not the bank officer who supervised the loan.

[4] Plaintiff also notes that as of January 1, 1983, his inventory was worth approximately $10,000. However, when he closed his store, the inventory was worth approximately $900.

one on behalf of FSB ever requested him to report the status of his inventory. Plaintiff claims that it was understood that sales of his inventory would be made to third parties during the term of the loan.

9) Plaintiff also reports that he attempted to negotiate a settlement to satisfy his debt to FSB. Plaintiff states that Sanders asked if Plaintiff could persuade his family to sign a new note. Plaintiff declined because his family was in financial distress. Plaintiff claims that Sanders then stated that he could not be responsible for the consequences of Plaintiff's failure to do as he had demanded.

10) During a loan committee meeting which took place after the March 1983 inspection, Sanders informed other FSB officials that the inventory was no longer present in Plaintiff's store.

11) Sanders states that after he informed the Bank that the inventory was not present, he did not participate in, offer advice upon, or make any recommendations regarding any action to be taken with respect to Plaintiff's loan.

12) Similarly, Boles reports that after his visit to Plaintiff's store, he did not participate in and was not aware of any decisions made by the Bank with respect to Plaintiff's loan. Boles states that he did not offer any advice or recommendations for action to be taken by the Bank regarding Plaintiff's loan.

13) At a meeting of the FSB board of directors in early 1983, one board member attempted to question MacLean about the legality of Plaintiff's sale of inventory. However, MacLean states that he refused to discuss the

subject and withdrew from any further participation in the matter.

14) However, Plaintiff notes that in 1983 MacLean had borrowed at least $86,490.50 from FSB, of which $40,490.50 was unsecured. Plaintiff also reports that Boulware was a co-maker on at least one of these loans.[5]

15) Plaintiff also notes that for several years prior to 1983 he had been active in the Johnson County Republican Party and had run for a state senate seat in 1980. According to Plaintiff, MacLean had been Plaintiff's political foe and was the county campaign chairman for Plaintiff's opponent in the senate race. Plaintiff also states that Boulware had actively opposed Plaintiff's campaign.[6]

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[5] Plaintiff contends that, although the Defendants deny that such a conversation occurred, it can reasonably be believed that, because he was a director of FSB and so heavily indebted to the Bank, MacLean told the board of directors that Plaintiff could be prosecuted for a violation of Texas law, but that he (MacLean) could not personally prosecute such a case because of a conflict of interest. Plaintiff claims that MacLean then asked County Attorney Boulware, both a debtor and a stockholder of the Bank, to prosecute the case in his place. These contentions are speculative and unsupported by evidence.

[6] Plaintiff thus charges that Defendants entered into a conspiracy to cause Plaintiff to be maliciously prosecuted for his failure to repay his loan from FSB. According to Plaintiff, Defendants knew that Plaintiff had not violated any criminal statute. Moreover, Plaintiff claims that each Defendant agreed that the Johnson County grand jury would be presented selected evidence and erroneously instructed on the law so as to create a belief that Plaintiff had committed a violation of §32.33 of the Texas Penal Code.

Plaintiff states that Boulware and MacLean knew that in order to violate section 32.33, there had to be evidence that

16) On May 13, 1983, FSB sent a demand letter to Plaintiff's attorney. When this letter was sent, the outstanding balance on Plaintiff's loan was $17,989.93. According to the Private Defendants, Plaintiff did not respond to this letter.

17) Campbell reports that he attended the meeting of the FSB board of directors at which the board decided to present Plaintiff's loan file to the Johnson County District Attorney for investigation. Campbell states that the board neither concluded that Plaintiff had engaged in any illegal act nor discussed whether Plaintiff violated any particular criminal statute.[7]

18) Following this board meeting, Campbell requested that Sanders, the loan officer for Plaintiff's loan, take Plaintiff's loan file to the District Attorney's office.

19) Campbell states that he did not assist Sanders in preparing the file to present to the District Attorney or accompany Sanders to the District Attorney's office or the County Attorney's office. Campbell also states that he had no knowledge of the contents of the loan file and that he had not communicated with the District Attorney's or County Attorney's office regarding any aspect of Plaintiff's loan file before the file was presented to those

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Plaintiff had destroyed, removed from the state, concealed, encumbered, or otherwise harmed or reduced the value of the inventory. Plaintiff states that Campbell, Boles, and Sanders knew that Plaintiff had done none of these things. None of these charges have evidentiary support.

[7] Sanders and Boles note that they did not attend this meeting.

offices. Furthermore, Campbell states that he neither signed a complaint against Plaintiff nor authorized any representative of the Bank to sign such a complaint.

20) Sanders states that he did not speak with anyone at FSB other than Campbell before he delivered the loan file to the District Attorney.

21) Boles and Sanders note that they did not participate in the preparation of any complaint to the District Attorney or County Attorney related to Plaintiff's loan.

22) Once he was informed that FSB had decided to refer the matter to the District Attorney, FSB attorney Curtis Pritchard wrote Plaintiff as follows:

> I previously wrote you on May 13, 1993 concerning your delinquent promissory note which had at the time of the letter a balance of $17,989.93 due and owing. This matter has not been taken care of and the First State Bank of Cleburne has elected to turn this matter over to the District Attorney's office in Johnson County, Texas.

23) Sanders states that when he delivered Plaintiff's loan file to the District Attorney's office, he had not communicated with any representatives of the Johnson County District Attorney or County Attorney's office regarding Plaintiff or any aspect of Plaintiff's loan. Sanders also states that he did not know what action would be taken by the District Attorney or County Attorney with regard to Plaintiff's loan.

24) At the District Attorney's office, Sanders attempted to present the loan file to District Attorney MacLean. However, Sanders reports that MacLean cited a

conflict of interest and referred Sanders to County Attorney Boulware's office since Boulware would act as the District Attorney for the purposes of Plaintiff's prosecution.

25) MacLean states that he did not discus the prosecution of Plaintiff with Boulware.

26) Sanders reports that he presented Plaintiff's loan file to the County Attorney and stated that the loan was past due and that the inventory that had served as collateral for the loan was no longer present at the stereo store. Sanders also states that he did not advise or recommend that the County Attorney take any particular action with respect to Plaintiff's loan. He reports that he did not tell the County Attorney that Plaintiff had violated any law and did not recommend or suggest that Plaintiff be prosecuted. He states that he simply wanted the County Attorney to review the file.

27) Sanders also reports that the County Attorney's office did not tell him what action it would take on Plaintiff's loan. Sanders further states that he did not participate in any meeting at which FSB representatives and representatives of the County Attorney and District Attorney's office discussed Plaintiff or any aspect of the loan made to him.

28) Boles states that he has never presented any evidence to the District Attorney regarding Plaintiff's loan or contacted any representative of the District Attorney's office regarding Plaintiff. He also states that no representative of the District Attorney's office has ever communicated with him in any manner regarding Plaintiff's loan or Plaintiff's prosecution.

29) Campbell, Boles and Sanders state that they did not participate in the decision-making process in which the County or District Attorney's offices determined that charges would be brought against Plaintiff.

30) Campbell and Boles state that they never had any conversations with Boulware regarding Plaintiff's prosecution or the indictment returned against him. Moreover, Campbell and Boles state that they never contacted any representative of the County Attorney's office regarding Plaintiff. They also state that they have no personal knowledge of when the County Attorney decided to bring charges against Plaintiff and do not know the factors that influenced this decision. They also state that they did not suggest, direct, or cause any representative of the County Attorney's office to bring charges against Plaintiff.

31) Sanders states that he did not assist the District Attorney or County Attorney in determining the charges to bring before the grand jury against Plaintiff.

32) Campbell, Boles, and Sanders state that they did not direct, suggest, or cause any representative of the Johnson County Attorney's or the District Attorney's office to bring charges against Plaintiff under Texas Penal Code §32.33.

33) Campbell and Boles state that they have never had any conversations with MacLean regarding the indictment and prosecution of Plaintiff.

34) Boles states that he was not aware that the County Attorney had decided to bring charges against Plaintiff.

35) Campbell, Boles, and Sanders state that they were not in any way involved in Boulware's decision to submit the case against Plaintiff to the Johnson County Grand Jury. Boulware states that he made this decision independently, consistent with his duties as acting District Attorney.

36) Boulware has generally denied Plaintiff's allegations. More specifically, he has stated that the complaint made by FSB involved an offense liable to indictment; that neither he nor MacLean entered into an agreement with FSB to inform the grand jury of FSB's complaint; and that the decision to inform the grand jury of the complaint against Plaintiff was based on his training and experience as a prosecuting attorney as well as his knowledge of the duties of a district attorney.

37) On June 22, 1983, Boulware wrote Plaintiff as follows:

> Complaint has been made that you have sold mortgaged property in an amount exceeding $10,000. The complaint has been made by the First State Bank of Cleburne and it specifically sets forth that you sold inventory which was lawfully mortgaged.
>
> This letter is to notify you that the matter is being referred to the Grand Jury on June 30, 1983. In the event you wish to testify you will need to appear at 9:00 a.m. in the Community Room in the courthouse of Cleburne, Texas.

38) Campbell and Boles note that they did not testify before the Johnson County grand jury that returned an indictment against Plaintiff. They also state that they

did not assist the County Attorney's or District Attorney's office in presenting evidence to the grand jury, did not provide any evidence to the County Attorney's or District Attorney's office regarding Plaintiff or his loan, and have no knowledge of what was presented as evidence to the grand jury.

39) Sanders states that he did not become aware that charges had been brought before the grand jury until he was subpoenaed to appear before that body.

40) Sanders, Campbell, and Boles state that other than the knowledge that Sanders has of his own testimony before the grand jury, they have no knowledge of the particular action taken by the grand jury with respect to Plaintiff.

41) Before testifying to the grand jury, Sanders states that he waited in a reception area outside the grand jury room for approximately 30 minutes to an hour. Sanders explains that the District Attorney's and County Attorney's offices open into this reception area.

42) Sanders also states that he did not speak with representatives of the County Attorney or District Attorney's office about any aspect of Plaintiff's case before testifying to the grand jury. Sanders states that other than the meeting at which he presented the Plaintiff's loan file, he did not have any conversations with the District Attorney or County Attorney about Plaintiff's case. Although he notes that he saw Boulware and MacLean while he waited to testify before the grand jury, Sanders states that he did not communicate with them about any aspect of Plaintiff's case.

43) However, Plaintiff states that he observed Sanders arrive at the grand jury room at approximately 7:30 p.m. According to Plaintiff, Sanders then proceeded into the District Attorney's office followed by MacLean. Then, Boulware, accompanied by grand juror Charles Credeur, came out of the grand jury room and went into MacLean's office. Plaintiff reports that these individuals were together approximately thirty minutes when the County Attorney came out of the District Attorney's office and went into the jury room. Sanders was then called to testify before the grand jury.

44) Sanders notes that at the time he testified before the grand jury, he did not know the basis on which charges had been brought against Plaintiff. Sanders states that when he testified before the grand jury, he answered all questions asked by the grand jurors in a truthful manner. He states that he did not tell the grand jurors that Plaintiff had violated any laws of the state, and he did not request that the grand jury indict Plaintiff or take any other action with respect to Plaintiff's loan. Sanders also states that the grand jury did not inform him of the actions it would take against Plaintiff.

45) According to the Private Defendants, no other officer, director, or employee of FSB testified before the grand jury.

46) Plaintiff also testified before the grand jury. During this testimony, Boulware advised Plaintiff that a complaint had been filed against him "saying that he had sold mortgaged property in excess of $10,000 without the knowledge or consent of [FSB]."

47) Plaintiff explains that he testified that no crime had taken place and that, as FSB knew and agreed, he had sold his inventory in the normal course of business. Specifically, Plaintiff reports that Boulware showed Plaintiff a copy of the January 1982 note and asked Plaintiff if he had signed it. Plaintiff stated that he had. Boulware then showed Plaintiff a copy of the December 1981 inventory sheet, asked Plaintiff if he recognized it, and then asked if Plaintiff had sold that inventory. Plaintiff stated that he had. Plaintiff reports that when the grand jurors asked him questions, he explained that it was not accurate for the Bank to state that Plaintiff did not have the Bank's consent or that the Bank did not have any knowledge that Plaintiff was selling his inventory. Plaintiff states that at this point, Boulware angrily stated: "O.K., Jay, let's get the facts straight. You mortgaged property, you sold it, you admit it, and that's the facts." According to Plaintiff, when the grand jurors asked Plaintiff whether he had an agreement with the Bank to keep a certain amount of inventory and when Plaintiff responded "no", the grand jurors appeared surprised.[8]

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[8] Plaintiff states that a grand juror told him that the grand jury had been reluctant to indict Plaintiff and that the grand jury had passed a resolution stating that the grand jury did not feel that Plaintiff had any criminal intent. This juror also stated that the grand jury asked Boulware to notify Plaintiff of this resolution. (However, Plaintiff states that he was never so notified). Furthermore, the juror told Plaintiff that the grand jury was not told anything about Plaintiff taking inventory out of the state. However, since this testimony is clearly hearsay, it is inadmissible and cannot be considered in support of Plaintiff's response to the motions for summary judgment.

48) MacLean did not appear before the grand jury regarding Plaintiff's case. Boulware presented Plaintiff's case to the grand jury, but he was not present during their deliberations.

49) Sanders states that he does not know the reasons that the grand jury returned an indictment against Plaintiff.

50) Campbell states that he was aware that Sanders testified before the grand jury. However, Campbell states that he was not present when Sanders testified and did not discuss Sanders' testimony until after the present lawsuit was filed. Campbell denies advising Sanders in any manner related to his grand jury testimony.

51) Campbell, Boles, and Sanders state that they never had any conversations with any representatives of the County Attorney's or District Attorney's office regarding the grand jury, the charges brought before the grand jury, or Plaintiff's indictment.

52) The grand jury indicted Plaintiff for a felony violation of Texas Penal Code §32.33 on June 30, 1983. The indictment returned against Plaintiff appears to be for "removing" mortgaged property. *See* Plaintiff's Amended Complaint Ex. A.[9] Plaintiff was advised of the indictment the next day.

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[9] The indictment does not clearly indicate what provision of section 32.33 Plaintiff was charged with violating. The indictment merely states that Plaintiff "intentionally and knowingly signed a security agreement which created a security interest in property, namely, stereo equipment, did then and there, with intent to hinder enforcement of such security interest, remove the property. . . . "

Plaintiff contends that he was indicted under section 32.33(e), the provision of the law that prohibits removal of secured property from the state without the effective consent of

53) Campbell, Boles, and Sanders state that they became aware of the indictment from members of the community. They state that they were not informed of the indictment by any representative of FSB, the grand jury, the County Attorney's office, or the District Attorney's office.

54) Campbell, Boles, and Sanders state that they did not attend any hearing, trial, or other court appearance in Plaintiff's criminal prosecution. They also state that they were not aware of actions taken by the court or the District Attorney's or County Attorney's office in connection with the indictment against Plaintiff.

55) On April 9, 1986, the prosecution dropped its case against Plaintiff.

In their summary judgment motion, the Private Defendants have argued that malicious prosecution does not constitute a constitutional tort, actionable under §1983. Although the Supreme Court has granted a writ of certiorari to review a judgment of the Seventh Circuit that held that malicious prosecution is not actionable under §1983, *Albright v. Oliver*, 975 F.2d 343 (7th Cir. 1992), *cert. granted*, 113 S. Ct. 1382 (1993), this Court declines to

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the secured party. Plaintiff argues that Defendants knew or should have known that Plaintiff was expected to sell his inventory in the normal course of business and that there was no evidence to show that Plaintiff violated this provision of section 32.33.

In contrast, Defendants argue that Plaintiff was charged under section 32.33(f)(2), the section of the law that prohibits disposing of secured goods that have a value of $10,000 or more. Defendants contend that there was probable cause to support an indictment of Plaintiff under this portion of section 32.33.

dismiss Plaintiff's §1983 claim on that ground. When this case was reviewed by the Fifth Circuit, that court noted that its "most recent cases have assumed that malicious prosecution violates §1983." *Brummett*, 946 F.2d at 1180 n.2 (citing *Thomas v. Kipperman*, 846 F.2d 1009 (5th Cir. 1989), *Hand v. Gary*, 838 F.2d 1420, 1426 (5th Cir. 1988), and *Wheeler v. Cosden Oil & Chemical Co.*, 734 F.2d 254 (5th Cir. 1984)). Moreover, in *Hand*, Judge Goldberg explicitly affirmed the vitality of Plaintiff's §1983 claim, writing that "[t]here is a constitutional right to be free of 'bad faith prosecution.' " *Hand*, 838 F.2d at 1424; *see also Dennis v. Higgins*, 498 U.S. 439 (1991) (noting that §1983 should be "broadly construed" to provide a remedy "against all forms of official violation of federally protected rights"). Therefore, this Court will not dismiss Plaintiff's §1983 claim on the grounds that that statute does not protect Plaintiff from being free of malicious prosecution.

The Private Defendants have also argued that Plaintiff cannot establish the "state action" element of a §1983 claim against any of them. However, as they acknowledge, the Private Defendants can be held liable under §1983 if they have conspired with state officials to deprive Plaintiff of a constitutional right. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Dennis v. Sparks*, 449 U.S. 24 (1980); *see also N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1563 (11th Cir. 1990) (noting that a private party could be held liable under §1983 for "corruptly conspir[ing] with state officials to maliciously prosecute an individual").

Most importantly though, Johnson County and the Private Defendants argue that Plaintiff cannot show that there is sufficient evidence of a conspiracy between the

Private Defendants and the prosecutors to show that there is a genuine issue for trial on Plaintiff's §1983 malicious prosecution claim. The Court agrees.

To establish a civil conspiracy to violate rights protected by §1983, Plaintiff must an [sic] show express or implied agreement among Defendants to deprive Plaintiff of his constitutional rights; Plaintiff must also show that there was an actual wrong to support the conspiracy. *See, e.g., Hunt*, 854 F.2d at 1563; *Hay v. City of Irving*, 893 F.2d 796, 799 (5th Cir. 1990). It is well established that a conspiracy can be proved by circumstantial evidence. Thus, this Court will not grant summary judgment if a jury could reasonably infer from the circumstances that Defendants conspired as Plaintiff has alleged. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 (1970). However, this Court must grant summary judgment if, once Defendants have met their initial burden, Plaintiff cannot come forward with a "genuine issue for trial" beyond some "metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586-87.

Regarding the substance of Plaintiff's §1983 claim, the Court notes that Plaintiff must show at least that either MacLean or Boulware entered a conspiracy to maliciously charge Plaintiff without probable cause. *Wheeler*, 734 F.2d at 260. It is important to note that if a purely private party alone instigates a state court action with malicious intent, no §1983 claim arises. *Id.* at 258 n.9. Similarly, merely filing a criminal complaint that contains falsehoods does not satisfy the "color-of-law" requirement either. *Daniel v. Ferguson*, 839 F.2d 1124, 1130 (5th Cir. 1988).

In this case, the Court concludes that there is not sufficient evidence to submit to a jury that Boulware or MacLean conspired with the Private Defendants to maliciously prosecute Plaintiff. Thus, the Court concludes that Defendants are entitled to judgment as a matter of law on Plaintiff's §1983 claim. *Id.* The summary judgment evidence reveals that Plaintiff's argument that Boulware and MacLean were involved in a conspiracy to maliciously prosecute him is based only upon conjecture, speculation, and naked allegations. In contrast, Boulware and MacLean have filed sworn denials of malicious involvement in Plaintiff's prosecution. For example, summary judgment evidence reveals that when he was questioned about the legality of Plaintiff's sale of inventory, MacLean refused to discuss the matter and withdrew from the discussion. The evidence also shows that MacLean referred Sanders to the County Attorney when Sanders attempted to present Plaintiff's loan file. Moreover, Maclean has sworn that he did not talk to Boulware about Plaintiff's prosecution and that he did not appear before the grand jury that indicted Plaintiff.

Similarly, the summary judgment evidence shows that Sanders merely presented Plaintiff's loan file to Boulware and stated that the loan was past due and that the inventory that had served as collateral for the loan was no longer present at Plaintiff's stereo st [sic] Boulware has stated that he exercised his independent discretion in deciding to present Plaintiff's case to the grand jury.

Furthermore, Campbell and Boles have sworn that they did not discuss Plaintiff's case with Boulware or any other member of the County Attorney's office. Sanders has acknowledged that he testified before the grand jury,

but he has stated that he answered all questions in a truthful manner. Plaintiff has no summary judgment evidence to contradict these statements.

Finally, Campbell's affidavit reveals that he did not speak with any representative of the County Attorney or District Attorney. In the face of these detailed denials, the Court concludes that there was no malicious involvement of Boulware or MacLean. *See Wheeler,* 734 F.2d at 260 (requiring maliciousness); *Hand,* 838 F.2d at 1426 (same); *Daniel,* 839 F.2d at 1131 (approving of the dismissal of a §1983 conspiracy claim where the district court found no evidence of a conspiracy involving the state actor).

Without any evidence to support Plaintiff's allegation that MacLean and Boulware were involved in the alleged conspiracy or that the prosecutors themselves maliciously prosecuted Plaintiff without probable cause, the crucial element of state action is absent from Plaintiff's §1983 claim. This fact is "crucial" because §1983 liability cannot be imposed upon the Private Defendants for their alleged concerted actions. As has been succinctly noted by another court, "an 'understanding' and 'willful participation' between private *and* state defendants is necessary to show the kind of joint action that will subject private parties to §1983 liability." *Bendiburg v. Dempsey,* 909 F.2d 463, 469 (11th Cir. 1990) (emphasis added); *see also Bartholomew v. Lee,* 889 F.2d 62, 63 (5th Cir. 1989) (same). Thus, Johnson County's and the Private Defendants' motions for summary judgment on Plaintiff's §1983 claim is **GRANTED.**

IV. Conclusion

Johnson County's and the Private Defendants' motion for summary judgment on Plaintiff's §1983 malicious prosecution claim is **GRANTED.** Plaintiff's pendent state law claim is **DISMISSED** without prejudice. 28 U.S.C. §1367(c)(3); *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 590 (5th Cir. 1992); *see also* 28 U.S.C. §1367(d). Judgment will be entered accordingly.

SO ORDERED.

DATED: July 14, 1993.

/s/ Barefoot Sanders
BAREFOOT SANDERS,
CHIEF JUDGE UNITED
STATES DISTRICT COURT
NORTHERN DISTRICT OF
TEXAS